80-1588

NO.

Office-Supreme Court, U.S.
FILED
MAR 19 1981
ALEXANDER L. STEVAS,
CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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RONALD JACOBS,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 16, 1981

## QUESTIONS PRESENTED

1. In holding that the government was not only permitted but "required" to present without limitation evidence that a government witness had pleaded guilty to conspiracy in connection with this case, did the Court of Appeals violate this Court's holding in Kirby v. United States, 174 U.S. 47 (1899), disregard Rule 803(22) of the Federal Rules of Evidence, and place itself at odds with the Third, Fifth, Sixth, Seventh and Eighth Circuits?

2. In affirming the district court's refusal to allow defense examination of materials claimed under the Jencks Act without first examining those materials, did the Court of Appeals violate the express command of 18 U.S.C. §3500(c)?

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SECOND CIRCUIT

---

The petitioner, Ronald Jacobs, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 22, 1980.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported, but appears in the Appendix hereto. The judgment of the United States District Court for the District of Connecticut appears in the Appendix hereto.

## JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on October 22, 1980. A timely petition for rehearing was denied on February 6, 1981, and this petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

be compelled in any crimiral case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by

him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §549:

. . .

Whoever, without authority, willfully removes, breaks, injures, or defaces any customs seal or other fastening or mark placed upon any vessel, vehicle, warehouse, or package containing merchandise or baggage in bond or in customs custody;

. . .

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. §659:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or

which constitute an interstate or foreign shipment of freight, express, or other property;

. . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

. . .

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. . . .

18 U.S.C. §2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

. . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §3500:

. . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its

discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

. . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

FEDERAL RULES OF EVIDENCE, RULE 803:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.

## STATEMENT OF THE CASE

Ronald Jacobs was charged with Dennis Schoendorf in an indictment returned in the District of Connecticut on July 13, 1979, with theft from interstate commerce of meat valued in excess of one hundred dollars (18 U.S.C. §§ 659 and 2), breaking and removing customs seals (18 U.S.C. §§ 549 and 2) and transporting across a state line meat valued in excess of five

thousand dollars (18 U.S.C. §§ 2314 and 2). He presented a defense of alibi. He was found guilty at a jury trial and was sentenced to imprisonment for two years, to be followed by a period of probation.

The Government's chief witness at trial was Richard Suello, an alleged accomplice in the crimes charged. Suello testified that he had participated with Jacobs, Schoendorf and others in the theft on March 22, 1979, of three truck trailers filled with frozen meat. Some of that meat was transported, he said, to Jersey City, New Jersey, where it was seized by federal agents and Suello was arrested. The rest of the meat was seized the following day in West Haven, Connecticut, a short distance from the scene of the theft.

To prove the existence of a "common plan or arrangement" between Mr. Jacobs and Suello, the Government presented testimony from Suello, over objection, that Suello had pleaded guilty to conspiracy in connection with this case. This evidence, although twice objected to, was admitted without limitation of any sort and for all purposes.

Suello's testimony was corroborated by a Government informer named Robert Proto, who claimed that in 1979 he owned and operated the Silver Fox Restaurant in Branford, Connecticut. Over defense objection, he said he began working for the FBI in the spring of 1978 and claimed to have provided information to the Government on many occasions regarding both this case and other matters. He further claimed on direct examination that his services were so valued that the FBI has paid him a total of approximately nine thousand dollars and the United States Marshal Service has paid him between eight thousand and ten thousand dollars.

Concluding his testimony on direct examination, Proto testified that the Government had promised him nothing for his testimony, had not pressured him in any way, and had paid him only five hundred dollars for his work on this case.

In the absence of the jury, the defendants thereupon moved for production of Jencks and Brady material regarding Proto. The court agreed to review the Government's apparently voluminous file on Proto in camera but, having done so,

refused to allow the defendants to see any of it. The file was sealed and marked for identification.

On appeal, the Second Circuit held "that the court did not err in refusing, after an in camera inspection, to turn over to the defense as Brady-Jencks Act material the entire government file on witness Proto. Defense counsel offered little beyond conclusory statements to support their claim that the file contained material which might impeach the witness so as to affect the outcome of the trial...."

The material which was the subject of the defendants' Jencks Act motion was not transmitted from the District Court to the Court of Appeals until after the Judgment of the District Court had been affirmed.

As to the Government's use of the accomplice's guilty plea to prove the defendant's guilt of the crimes charged, the Court of Appeals held simply "that the government was entirely within its rights and indeed was required to make such disclosure."

## REASONS FOR GRANTING THE WRIT

### I

### In Holding That The Government Was Not Only Permitted But "Required" To Present Without Limitation Evidence That A Government Witness Had Pleaded Guilty To Conspiracy In Connection With This Case, The Court Of Appeals Violated This Court's Holding In Kirby v. United States, 174 U.S. 47 (1899), Disregarded Rule 803(22) Of The Federal Rules Of Evidence, And Placed Itself At Odds With The Third, Fifth, Sixth, Seventh And Eighth Circuits.

Mr. Jacobs was charged with three substantive offenses, but in each instance as an aider and abettor. In addition, the jury was instructed over the defendant's objection that if the jury first found that the defendant had participated in a "common plan or arrangement" to commit a crime, the jury then could consider against the defendant all the acts and statements of the other participants in the "common plan or arrangement." The most important of these alleged other participants in the "common plan or arrangement" was the Government's witness Richard Suello.

As long ago as 1899, this Court

reversed a conviction because the prosecutor, just as in the case at bar, had proved the guilt of the alleged accomplice by proving the guilty plea of the principal. In Kirby v. United States, 174 U.S. 47 (1899), this court held that "it is an elementary principle of justice, that one man shall not be affected by another's... admission, to which he is a stranger.... The fundamental error in the trial below was to admit in evidence the record of the conviction of the principal felon as competent proof for any purpose." 174 U.S. at 58, 60.

Rule 803(22) of the Federal Rules of Evidence provides expressly that "[e[vidence of a final judgment, entered...upon a plea of guilty...adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year" may be admitted for certain very limited purposes, as an exception to the hearsay rule -- "but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused." (Emphasis supplied.) The Advisory Commit-

tee has noted that to permit such evidence "would seem clearly to violate the right of confrontation."

The ruling of the Second Circuit panel on this point is directly contrary to, and in conflict with, the holdings of several other circuits.

In United States v. Harrell, 436 F.2d 606 (5th Cir. 1970), the Government had elicited evidence that the defendant's alleged co-conspirator had pleaded guilty to the conspiracy and substantive offenses. The Fifth Circuit reversed, although the defendant had not objected to such evidence. "No purpose was stated, none was required to be stated, when the question of Norris' prior guilty pleas was introduced. The legitimate presumption is that the evidentiary purpose was the general one of demonstrating Harrell's guilt of the offenses for which he was on trial.... With respect to Harrell's guilt or innocence, Norris' plea of guilty was no more and no less than an inadmissible hearsay statement....Despite the failure of trial counsel...to object, we are firm in the view that 'plain error' occurred...." 436 F.2d at 614, 615.

In United States v. Vandetti, 623 F. 2d 1144 (6th Cir. 1980) (Kennedy, J.), the Sixth Circuit reversed a conviction because the Government had presented evidence of the guilty pleas of its witnesses without limiting such evidence: "The fact that a jury found that persons indicted with appellant Vandetti were guilty is not relevant to a determination of appellant's guilt. It has no tendency to make the existence of that guilt more probable or less probable than it would be without the evidence. Their conviction is not an element of the crime....No other basis for offering them being asserted by the prosecutor, they are thus inadmissible." 623 F.2d at 1147, 1148.

In a recent Third Circuit case, "the prosecution presented the testimony of a co-conspirator,...who testified about his own plea of guilty to a charge arising out of the alleged conspiracy. Over defense counsel objections, the trial judge permitted the introduction of this testimony as to the guilty plea without requiring the prosecutor to explain its purpose and without cautioning the jury that evidence

of this nature could not be used as substantive proof of the existence of a conspiracy." Finding constitutional error, the court held: "It is well settled in this circuit that use of a co-conspirator's guilty plea as substantive proof of a defendant's complicity in a conspiracy without cautionary instruction is not admissible as evidence. United States v. Toner, 173 F.2d 140, 142 (3d Cir. 1949)." Bisaccia v. Attorney General of New Jersey, 623 F.2d 307, 308, 312 (3d Cir. 1980).

Cases in the Seventh and Eighth Circuits are to the same effect. E.g., United States v. Wilcher, 332 F.2d 117 (7th Cir. 1964); United States v. Little Boy, 578 F.2d 211 (8th Cir. 1978).

The Second Circuit's ruling on this fundamental point of law, considered essential to a fair criminal trial since the earliest times, is out of step with the holdings of the other circuits, is directly contrary to this court's prior ruling, and flatly ignores the command of the Federal Rules of Evidence. Certiorari should be granted to bring the Second Circuit into compliance with the law in

this respect.

II

In Affirming The District Court's Refusal To Allow Defense Examination Of Materials Claimed Under The Jencks Act Without First Examining Those Materials, The Court Of Appeals Violated The Express Command of 18 U.S.C. §3500(c).

After the Government witness Proto had testified upon direct examination, a quantity of Government records was turned over to the district court in camera for a determination whether any portion of such records should be made available to defense counsel either under Brady v. Maryland, 373 U.S. 83 (1963), or the Jencks Act, 18 U.S.C. §3500. The court ruled that nothing should be given to the defense, sealed the documents and marked them as a court exhibit. Upon appeal, Mr. Jacobs claimed that the materials should have turned over both as prior statements of the witness within the meaning of the Jencks Act and as exculpatory material. When Mr. Jacobs sought to have the sealed exhibit made available to the Court of Appeals for its review, the Government

objected. Jacobs filed a motion with the Court of Appeals for transmittal of the sealed exhibit, but although the motion was filed before oral argument of the appeal, it was not granted until after the appeal had been decided. In his petition for rehearing in the Court of Appeals, Mr. Jacobs again asked the court to examine the sealed exhibit and make its ruling upon the basis of such an examination. The petition for rehearing, however, was denied.

Thus, the Second Circuit decided this Jencks Act claim adversely to the appellant without ever examining the documents which were the subject of the appeal.

In declining the invitation to examine the sealed exhibit, the Second Circuit violated the clear command of 18 U.S.C. §3500(c), which provides: "If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States

and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge." (Emphasis supplied.)

In deciding a Jencks Act claim without ever looking at the documents involved, the Second Circuit blatantly violated the statutory command. Certiorari must be granted to enforce compliance with the law.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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DATED: March 16, 1981

# APPENDICES

APPENDIX A

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-second day of October, one thousand nine hundred and eighty.

Present:

HONORABLE WILLIAM H. TIMBERS,

HONORABLE JON O. NEWMAN,

Circuit Judges.

HONORABLE EDMUND PORT,

District Judge,
sitting by designation.

Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

-v.- 80-1219
80-1237

RONALD JACOBS and
DENNIS SCHOENDORF,
Appellants.

Appeals from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and the same hereby are affirmed.

Appellants Jacobs and Schoendorf were indicted on three counts of a five-count indictment. They were charged with Theft from Interstate Shipment, 18 U.S.C. § 659 (1976); Breaking Customs Seals, 18 U.S.C. § 549 (1976); and Interstate Transportation of Stolen Property 18 U.S. C. § 2314 (1976). They also were charged with aiding and abetting these crimes. 18 U.S.C. § 2 (1976).

On March 11, 1980, after a hearing, appellants' motions to suppress physical evidence and statements were denied.

Their jury trial commenced on April 8, 1980 and ended on April 23. The jury returned guilty verdicts as to both defendants on each of the three counts. This appeal followed.

Appellants urge chiefly seven grounds for reversal of the convictions: first, that certain remarks of the prosecutor deprived them of a fair trial; second, that the district court erred in finding

that appellants lacked standing to move to suppress the results of the search of a Freuhauf trailer that contained stolen meat; third, that testimony elicited by the government from its witness as to his conviction in a related matter required an instruction from the court which was not given; fourth, that it was an abuse of discretion for the court not to turn over to appellants the entire government file on its witness Proto; fifth, that it was improper for the court to refuse to suppress statements made by appellant Schoendorf before and immediately after his arrest; sixth, that the court erred in admitting in evidence documentary material which tended circumstantially to connect appellants with recovered stolen meat; and seventh, that the court erred in denying the motion for judgment of acquittal because the government failed to prove the interstate commerce element of the offense. We hold that each of appellants' claims is without merit.

The first claim is that the prosecutor engaged in prejudicial conduct by referring to the appellants as "crooks" in his rebuttal summation. The remark should

not have been made, and it would have been preferable for the district judge promptly to advise the jury of its impropriety, but we are satisfied that any resulting prejudice was too slight to warrant a reversal. See United States v. Benter, 457 F.2d 1174, 1178 (2 Cir. 1972).

The district court did not err in finding that appellants lacked standing to challenge the search of the Freuhauf trailer. Neither appellant established the sort of possessory interest which this Court in some contexts has held sufficient. United States v. Ochs, 595 F.2d 1247 (2 Cir.), cert. denied, 444 U.S. 955 (1979). The court carefully and correctly applied the test enunciated in Rakas v. Illinois, 439 U.S. 128 (1978), where the Supreme Court held that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143. On the facts here, where neither appellant was present at the time of the search, the tractor had no registration plates and the

trailer was registered to a Pennsylvanian not involved in the investigation or trial, and all evidence of appellants' ownership was based on the questionable testimony of witness Suello, we hold that the court did not err in finding that appellants had not sustained their burden of establishing standing by the evidence offered at the hearing on the motion to suppress. Appellants further contend that evidence presented at trial established their ownership of the trailer. Without reaching the government's contention that evidence presented at trial may not be considered on the issue of standing when the evidence was available at the hearing on the motion to suppress, we hold that the trial testimony did not add in any significant degree to the evidence considered and found insufficient at the suppression hearing.

As for appellants' claim that the government's disclosure of witness Suello's guilty plea in a related matter had a spillover effect, we hold that the government was entirely within its rights and indeed was required to make such disclosure.

We further hold that the court did not err in refusing, after an in camera inspection, to turn over to the defense as Brady-Jencks Act material the entire government file on witness Proto. Defense counsel offered little beyond conclusory statements to support their claim that the file contained material which might impeach the witness so as to affect the outcome of the trial, in accordance with the standard of this Circuit. Stassi, supra, 544 F.2d at 584; United States v. DiFrancesco, 604 F.2d 769 (2 Cir. 1979), cert. granted, 444 U.S. 1070 (1980). We decline to disturb the trial judge's determination that the material in the file would not have affected the outcome.

We also hold that the court was correct in refusing to suppress the statement by appellant Schoendorf, first to a federal agent on the street near his place of business, and second after his arrest and after Miranda warnings had been given. The first statement squares with the holding of Beckwith v. United States, 425 U.S. 341 (1976), where a statement by the target of an investigation -- in a non-

custodial context -- was held admissible despite the failure of the agent to give Miranda warnings. On the facts here, the colloquy was almost friendly and certainly non-custodial and was thus outside the scope of Miranda. The second set of statements were unsolicited answers to permissible personal data questions. Unlike the situation in Rhode Island v. Innis, 48 U.S.L.W. 4506 (May 12, 1980), where the Supreme Court approved the admission of an answer to a suggestive conversation among policemen in the presence of the accused, here there was no leading conversation, no devious questions, and no attempt to evade Miranda safeguards. The instant case is a stronger one for the government than Innis. We hold that the blurted answers were properly admitted in evidence.

With respect to the claim, that the court erred in admitting circumstantial documentary evidence, the rulings of the court were not arbitrary or capricious, with the standard enunciated in United States v. Robinson, 560 F.2d 507 (2 Cir.) (en banc), cert. denied, 435 U.S. 905

(1978). We hold that admission of this disputed evidence was a proper exercise of the court's discretion.

Finally, we hold that the court did not err in denying the motion for judgment of acquittal. Appellants misstate the case against them when they argue that the government proved only foreign shipment and not interstate shipment. The stolen beef and veal was taken from New Jersey, through New York, to Connecticut, and, in the case of the veal, back through New York to New Jersey. The evidence of actual interstate shipment is strong. The instant case is a stronger one than United States v. Wora, 246 F.2d 283 (2 Cir. 1957), where the conviction was affirmed even though only foreign shipment was proven. Appellants here were on notice of the charges against them. Those charges were proven.

WILLIAM H. TIMBERS/s/
UNITED STATES CIRCUIT JUDGE

JON O. NEWMAN/s/
UNITED STATES CIRCUIT JUDGE

EDMUND PORT/s/
UNITED STATES DISTRICT JUDGE,
Sitting by Designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Sixth day of February one thousand nine hundred and Eighty-One

Present: HON. WILLIAM H. TIMBERS
HON. JON O. NEWMAN,
Circuit Judges
HON. EDMUND PORT, District Judge

United States of America,
Plaintiff-Appellee,

-v- 80-1219

Ronald Jacobs,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Ronald Jacobs

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro/s/
Clerk

APPENDIX C

United States District Court for
DISTRICT OF CONNECTICUT

United States of America vs.

RONALD JACOBS

CRIMINAL B-79-26

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date MAY 23, 1980

X WITH COUNSEL John R. Williams, Esq.

There being a verdict of XX GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of Title 18, United States Code, Sections 659 and 2; 549 and 2; and 2314 and 2 (theft from interstate commerce; broken custom

seals and interstate transportation of stolen goods)
as charged in Counts One, Two and Three of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count One.

It is ORDERED AND ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count Two. The sentence on Counts One and Two are to run concurrently.

It is FURTHER ORDERED AND ADJUDGED that imposition of sentence is suspended on Count Three and the defendant is placed on probation for a period of five (5) years. Said period of probation is to

commence upon his release from custody on Counts One and Two.

T.F. Gilroy Daly/s/
5-28-80

No. 80-1588

FILED
MAY 27 1981
ALEXANDER L. STEVAS
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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RONALD JACOBS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WADE H. MCCREE, JR.
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

DEBORAH WATSON
*Attorney*

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## QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court erred in permitting a government witness to testify that he had pleaded guilty to a charge related to those on which petitioner was convicted.

2. Whether the court of appeals acted improperly in affirming the district court's denial of petitioner's request to examine certain government files without first examining those files itself.

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-1588

RONALD JACOBS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. A petition for rehearing was denied on February 6, 1981 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on March 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of unlawfully appropriating goods in interstate commerce, in violation of 18 U.S.C. 659 (Count I), breaking customs seals, in violation of 18 U.S.C. 549 (Count II), and transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 (Count III). He was sentenced to concurrent terms of five years' imprisonment on Count I and two years' imprisonment on Count II. Imposition of sentence on Count III was suspended and petitioner was placed on five years' probation, to begin after he had served his other sentences (Pet. App. 1c-3c).

The evidence showed that on the evening of March 22, 1979, petitioner, Dennis Schoendorf, and Richard Suello stole containers of veal (valued at $93,600), and beef (valued at $36,400) from a warehouse in New Haven, Connecticut (Tr. 54, 56-58, 67-69, 78-79, 103, 117, 123-124, 139-142).[1] The containers had been shipped from New Zealand to New Jersey, where they were placed under seal by the United States Customs Service, and then transported to the New Haven warehouse (Tr. 8-52, 54, 58, 74-75, 78). Several days later petitioner attempted to arrange a sale of the meat to an FBI undercover agent posing as a trafficker in stolen goods (Tr. 412-414, 455-460). Petitioner provided the agent with a sample of the veal, then broke off negotiations without explanation (Tr. 374-376, 461-464). That evening Suello and Schoendorf transported a trailer containing the veal to New Jersey (Tr. 179-183, 186-191),

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[1] Schoendorf was tried with petitioner and convicted on the same charges. He has filed a separate petition for a writ of certiorari, No. 80-1788.

where, several days later, federal agents arrested Suello and seized the trailer (Tr. 199-200). The following day, federal agents discovered and seized the trailer containing the stolen beef, which had remained in Connecticut. Petitioner, apparently unaware of this, made arrangements to sell the beef to the undercover agent and to deliver it to Buffalo, New York (Tr. 350-358, 362-363, 376-380, 423, 425, 468-476).

1. Suello testified for the government against petitioner. At the beginning of Suello's testimony, the government established that he had been convicted on two counts of larceny in state courts (Tr. 125) and had been charged with possession of marijuana with intent to distribute, a charge that was still pending (*ibid.*). A defense objection that the government was impeaching its own witness was overruled (Tr. 124). The government then elicited that Suello was "arrested in connection with this case * * * down in New Jersey" and that after his arrest he had "pled guilty to conspiracy" pursuant to an agreement with the government (Tr. 126-128). Petitioner unsuccessfully objected to this testimony on the ground that it was "hearsay" (Tr. 126, 127). Suello testified that he had completed a term of six months' confinement on the conspiracy charge (Tr. 129). In response to the government's questions, Suello then described his agreement with the government (Tr. 128);[2] he stated that there was no con-

[2] In exchange for dismissal of all other charges and return of the seized tractor-trailer to a creditor who held a security interest in it, Suello was to plead guilty and "cooperate and tell of my participation in" the theft of the meat (Tr. 128) in the New Jersey case (Tr. 210). The government did not agree to recommend a sentence (Tr. 129).

nection between his plea agreement in New Jersey and his testimony against petitioner and that the government had not promised him anything in return for his testimony against petitioner (Tr. 210).

Petitioner's counsel cross-examined Suello at length about his plea agreement with the government, repeatedly attempting to elicit from Suello the admission that he had fabricated his testimony in order to escape the additional imprisonment with which the government could have threatened him (*e.g.*, Tr. 243, 279). In this connection, petitioner's counsel attempted to establish that Suello might have been convicted of theft of goods in interstate commerce, interstate transportation of stolen property, and breaking a customs seal (Tr. 245)—the three offenses of which petitioner was convicted. Suello denied that he was guilty of breaking a customs seal (*ibid.*). By asking questions that the district judge held were improper, petitioner's counsel also made it known to the jury that the defendant against whom Suello testified in New Jersey was acquitted (Tr. 216, 248).

At one point, while the jury was absent, petitioner's attorney expanded on his objection to the government's questions. The court's ruling, he said, "allow[ed] the Government to introduce evidence discrediting its own witness on direct; evidence, in other words, of a prior inconsistent statement. * * * It was hearsay, and it is an effort to discredit a witness by out-of-court statements * * *. That's why I objected to it * * *" (Tr. 287). The government's attorney replied: "[I]t is the Government's position [that] we have a responsibility to bring out, ourselves, if we can, the background of a witness, particularly if that background goes to his credibility. * * * [The members of the] jury * * * feel as though they have

a right to the full background of the individual * * *" (Tr. 288). The judge again overruled petitioner's objection and immediately asked petitioner's attorney if he wished to suggest any instructions for the jury (*ibid.*). Neither then nor at any other time did petitioner suggest that the judge should instruct the jury as to limitations on the use to which Suello's testimony about his guilty plea could be put.

In their summations, government attorneys mentioned Suello's guilty plea only once (Tr. 839);[3] their clear purpose was to emphasize that Suello had been given "no promises" (Tr. 840) in return for his testimony. The government did not argue that Suello's guilty plea was in some way evidence of petitioner's guilt. By contrast, petitioner's counsel began his closing argument by saying that the government's case was "Richard Suello and nothing else" (Tr. 845). He concluded his summation by saying, "So what this case boils down to, Ladies and Gentlemen, is do you buy Richard Suello beyond a reasonable doubt * * *" (Tr. 860). Much of his argument was an attack on Suello's credibility. He suggested repeatedly that Suello's testimony was the result of a "deal" with the government (Tr. 849-853). Petitioner's counsel also cited Suello's denial that he had broken the customs seals as evidence that petitioner was not guilty of that offense (Tr. 846).

2. Robert Proto, who had been a government informant for two years (Tr. 401-404) and had been

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[3] At another point in his summation a government attorney said that Suello "admitted his involvement" (Tr. 829). But the attorney was recounting the details of Suello's testimony, and the context makes it plain that he was referring to admissions made during that testimony, not to Suello's guilty plea.

in the government's Witness Protection Program at one time (Tr. 430-431, 434), testified about petitioner's efforts to sell the stolen meat (Tr. 406-427). Petitioner was given some information from the government's file on Proto, including a summary of an interview between Proto and the undercover agent who negotiated with petitioner over the sale of the stolen meat (Tr. 429-430). After Proto's direct testimony, however, petitioner asked for "the records in the possession of the Government concerning [Proto's] prior work for the Government" (Tr. 429) and "all of its records concerning in any way the delivery of benefits of whatever kind, whether pecuniary, material, or otherwise, to this witness" (Tr. 446). Petitioner's counsel explained: "[T]he Government did credit this man by putting on evidence that he had worked for them in other cases and testified elsewhere * * *. I think, since the Government has done that, that under the Jencks rule I am entitled to have, at least within reasonable limits, his history" (Tr. 436). He added that his cross-examination of Proto would be aided if he could suggest "a pecuniary motive to lie" (Tr. 446). The judge then said to the government attorney: "In the interests of safety, I think the best thing you can do is to turn over all documents you have relating to Mr. Proto, at least commencing * * * when he became a Government informant, for in camera inspection" (Tr. 450). After examining the documents the judge found "nothing under any theory that I am aware of * * * which is producible * * * and not otherwise produced" (Tr. 583-584). The documents were sealed, marked as court exhibits, and returned to the custody of the government (Tr. 788-790).

3. Petitioner appealed his convictions. The government informed the court of appeals that the documents were available for inspection but that the government wished to retain custody of them; it offered to deliver the documents to the court of appeals by hand on the understanding that they would be returned to the government immediately after the court had concluded its inspection.[4] Petitioner moved that the documents be transferred to the court of appeals. Without acting on his motion, the court affirmed petitioner's conviction (Pet. App. 1a-8a), holding that the district court did not err in refusing to disclose the government's file on Proto. The court said: "Defense counsel offered little beyond conclusory statements to support their claim that the file contained material which might impeach the witness so as to affect the outcome of the trial * * *. We decline to disturb the trial judge's determination that the material in the file would not have affected the outcome" (Pet. App. 6a). The court also held that "the government was entirely within its rights and indeed was required to make * * * disclosure" of Suello's guilty plea (Pet. App. 5a).

Some time after its decision, the court granted petitioner's motion to transmit the sealed documents. In his petition for rehearing petitioner asked the court to examine those documents (Pet. 19). On February 6, 1981, the court of appeals denied rehearing (Pet. App. 1b-2b).

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[4] These facts appear not to be in the record; we have learned them from the Assistant United States Attorney who represented the government in the court of appeals.

## ARGUMENT

1. Petitioner contends (Pet. 13-18) that under the decisions of this Court and several courts of appeals, the district court committed plain error when it allowed Suello to testify about his guilty plea in New Jersey and did not give a limiting instruction. This contention is without merit. Suello's plea agreement with the government was clearly relevant to his credibility, as petitioner's vigorous use of it showed. The government was entitled to elicit evidence of that agreement both in order fully to inform the jury and "to prevent the defense from creating a misleading impression, or the jurors from thinking, that the Government is seeking to keep something from the jury." *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). See, *e.g.*, *United States* v. *Hasenstab*, 575 F.2d 1035, 1040 (2d Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Medina-Arellano*, 569 F.2d 349, 356-357 (5th Cir. 1978); *United States* v. *Wiesle*, 542 F.2d 61 (8th Cir. 1976); *United States* v. *King*, 505 F.2d 602, 605-608 (5th Cir. 1974); *United States* v. *Rothman*, 463 F.2d 488, 490 (2d Cir.), cert. denied, 409 U.S. 956 (1972). Petitioner cites *Kirby* v. *United States*, 174 U.S. 47 (1899), but that case establishes only that the government may not use one party's guilty plea as substantive evidence of an element of an offense charged against another party. Here, the government made no effort to use Suello's guilty plea in that way.

Thus the only question is whether, on the facts of this case, Suello's testimony about his guilty plea prejudiced petitioner to such a degree that petitioner's conviction must be reversed. See Fed. R. Evid. 403; *Nelson* v. *O'Neil*, 402 U.S. 622 (1971); *Harrington* v. *California*, 395 U.S. 250 (1969). For

several reasons, petitioner was not so prejudiced. First, Suello's guilty plea, by itself, did not implicate petitioner, either explicitly or implicitly. Suello testified that he had pleaded guilty to "conspiracy" in New Jersey; petitioner was not charged with conspiracy. It was petitioner's counsel who linked Suello to the specific crimes for which petitioner was convicted. Indeed, Suello denied that he was guilty of one of those offenses, and petitioner attempted to use that denial to show his own innocence. Moreover, neither the government nor the nature of the evidence suggested to the jury that because Suello was guilty petitioner had to be guilty. It is difficult even to articulate any line of reasoning the jurors might have followed in inferring petitioner's guilt from the fact of Suello's guilty plea; certainly petitioner does not articulate it. In fact, petitioner's argument was exactly the opposite: Suello's guilt, petitioner said, caused Suello to accuse petitioner unjustly in return for the government's leniency.[5]

Second, Suello was fully and vigorously cross-examined on all of his testimony about petitioner's complicity. See *Nelson* v. *O'Neil*, *supra*, 402 U.S. at 627-629; *California* v. *Green*, 399 U.S. 149, 153-164 (1970). Petitioner had ample opportunity to try to establish that Suello's admissions of guilt were false, if petitioner had wished to do so. In fact, of course, petitioner elected to emphasize Suello's guilt instead of questioning it.

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[5] The acquittal of the defendant against whom Suello testified in New Jersey—which petitioner improperly communicated to the jury—further suggested that there was no necessary connection between Suello's guilt and that of any other person charged by the government.

Finally, the actions of petitioner's counsel strongly suggest that the evidence of Suello's guilty plea did not prejudice petitioner. While petitioner's counsel described the evidence as "hearsay," he never explained how the hearsay would damage his case and never focused the judge's attention on any possibility that the evidence might suggest petitioner's guilt. Nor did counsel, despite a clear invitation, suggest a limiting instruction. In addition, Suello's guilty plea, and the government's supposed agreement with him, were central to petitioner's defense; petitioner would almost certainly have introduced evidence of Suello's guilty plea if the government had not. Under these circumstances, the court of appeals correctly concluded that Suello's testimony about his guilty plea did not warrant reversal.

There is no conflict among the circuits on this point. In *Bisaccia* v. *Attorney General*, 623 F.2d 307, 308-309 (3d Cir. 1980), and *United States* v. *Little Boy*, 578 F.2d 211, 212-213 & n.2 (8th Cir. 1978), the prosecutors argued vigorously to the jury that co-conspirators' guilty pleas, by themselves, helped demonstrate the defendants' guilt. The government made no such argument here. Indeed, in *United States* v. *Wiesle*, *supra*, a case closely analogous to the present case, the Eighth Circuit said (542 F.2d at 62-63; footnote omitted):

> When a co-defendant appears as a witness at defendant's trial, * * * [e]vidence that he entered a plea of guilty to the same offense is not error unless it is elicited as substantive proof of the defendant's guilt. Where it is introduced for other purposes, such as * * * to reflect on a witness' credibility * * * evidence of a co-defendant's guilty plea is clearly admissible. * * *

> The record does not show, nor does appellant contend, that the government, on direct examination, stressed the fact that the co-defendants here pled guilty or suggested to the jury, at any time, that it could infer defendant's guilt from their guilty pleas. To the contrary, it appears that emphasis, if any, arose from appellant's attempt to show a possible "deal" for leniency by the government. Although the trial judge failed to give an appropriate cautionary instruction, it is important to note that appellant neither requested the instruction nor objected to its absence. The admission of the guilty pleas into evidence was proper and, in light of the overwhelming evidence of guilt, the failure to give a cautionary instruction was not such plain error as to require reversal.

In contrast to the present case, the prosecution appears to have had no legitimate purpose for introducing the witnesses' convictions in *United States* v. *Vandetti*, 623 F.2d 1144, 1146-1148 (6th Cir. 1980), or guilty plea in *United States* v. *Wilcher*, 332 F.2d 117 (7th Cir. 1964). Petitioner himself quotes (Pet. 16) the passage from *Vandetti* which concludes that evidence of the convictions of others involved in a criminal scheme with the defendant was inadmissible because "[n]o other basis for offering [it was] asserted by the prosecutor" except that it tended to show the defendant's guilt (623 F.2d at 1147-1148). Neither *Vandetti*, *Wilcher*, nor *United States* v. *Harrell*, 436 F.2d 606 (5th Cir. 1970), suggests that in those cases the defense attorneys vigorously cross-examined on the basis of the guilty pleas, or made the witnesses' guilty pleas and plea bargains the centerpiece of the defense. In *Wilcher*, the court recounted the efforts of defense counsel to keep evidence of the witness's guilty plea from the jury entirely. In *Har-*

*rell*, the witness pleaded guilty to a conspiracy that allegedly involved the defendant and others, but attempted to make clear when he pleaded guilty that he had not conspired with the defendant. The witness testified at the defendant's trial that the defendant was not involved; the prosecutor elicited testimony about the guilty plea in a way that left "[t]he impression * * * that somehow the plea of guilty was inconsistent with [the witness's] testimony at trial * * * or worse yet, that it somehow proved [the defendant's] guilt" (436 F.2d at 614). The Fifth Circuit appeared to believe that this misleading use of the guilty plea was decisive (see *id.* at 615, 617). Thus petitioner has pointed to no authority supporting a conclusion that another circuit would reach a different result on the facts of this case.

2. Petitioner also asserts (Pet. 18-20) that the decision of the court of appeals must be reversed because that court did not expressly note that it had examined the sealed documents before rejecting petitioner's claim that the Jencks Act, 18 U.S.C. 3500, entitled him to discovery of certain of those documents. Petitioner cites no authority for this contention,[6] and for several reasons it fails.

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[6] Petitioner asserts that the court of appeals' procedure violated 18 U.S.C. 3500(c). This assertion is incorrect for at least two reasons. First, the district court's in camera review appears not to have been an inspection under Section 3500(c), "in which the Government admits that a document in its possession is a 'statement' [within the meaning of the Jencks Act] but submits the paper for the judge's *in camera* inspection to delete matter which the Government contends does not relate to the subject matter of the testimony of the witness" (*Campbell* v. *United States*, 365 U.S. 85, 93 (1961)). Instead, the district court's action was the "different" proceeding in which the government "contend[s] that a paper

First, even the district court was not obligated to examine the documents in question. The Jencks Act requires the government to disclose not all information in its files pertaining to a witness, but only "statement[s] * * * of the witness in the possession of the United States * * * relat[ing] to the subject matter as to which the witness has testified." See 18 U.S.C. 3500(b). The term "statement" is carefully defined by the Act to include only statements made by the witness and adopted or approved by him, contemporaneously recorded and "substantially verbatim recital[s]" of the witness's oral statements, and records of grand jury testimony (18 U.S.C. 3500(e)).[7] And as the Court has said (*e.g.*, *Goldberg* v. *United States*, 425 U.S. 94, 104 (1976)), one of the purposes of the act is to prevent defendants from "rov-[ing] at will through Government files" (see S. Rep.

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in its possession was not a 'statement' " (*ibid.*). Second, the government made the documents available to the court of appeals at all times after the appeal was docketed.

[7] Section 3500(e) provides:

> (e) The term "statement", as used in * * * [relevant portions of the Jencks Act] in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

No. 569, 85th Cong., 1st Sess. 3 (1957)). Consequently, as this Court has implicitly recognized (see, *e.g.*, *Goldberg* v. *United States*, *supra*, 425 U.S. at 109; *Campbell* v. *United States*, 365 U.S. 85, 92-93 (1961); *Palermo* v. *United States*, 360 U.S. 343, 354-355 (1959) (in camera examination is appropriate "when it is doubtful whether the production of a particular statement is compelled by the statute"); *Jencks* v. *United States*, 353 U.S. 657, 666 (1957)), and as several courts of appeals have held (*e.g.*, *United States* v. *Robinson*, 585 F.2d 274, 280-281 (7th Cir. 1978); *United States* v. *Nickell*, 552 F.2d 684, 689 (6th Cir. 1977), cert. denied, 436 U.S. 904 (1978)), the mere fact that government files contain information on a witness does not require a district judge to conduct an in camera search for statements that might be disclosable under the Jencks Act; the defendant has a "burden * * * to establish by probative evidence—usually on cross-examination of the witness alleged to have given a statement—that there is reason to believe that a statutory 'statement' may exist. Certainly more must be shown than a speculative possibility." *Goldberg* v. *United States*, *supra*, 425 U.S. at 124 (Powell, J., concurring).

Here, petitioner did not even assert—let alone "establish by probative evidence"—that the portions of Proto's file not disclosed to petitioner contained "statements" dealing with Proto's testimony in this case. Petitioner does not now, and did not at trial, point to anything in Proto's testimony that suggests that such statements exist. Instead, petitioner's counsel gave, as his reasons for seeking the file, his belief that Proto's "history" (Tr. 436) and evidence of the payments Proto received from the government might help impeach Proto in some general way. The district court reviewed the government's file out of an

excess of caution; it cannot have been error for the court of appeals to decline to reexamine it.

Moreover, even if the district court was obligated to examine the government's file, the court of appeals did not have to duplicate that examination in order to hold, as it did, that any failure to disclose material did not prejudice petitioner. Proto's evidence was corroborated by the testimony of the undercover agent (see Tr. 452-480). In his summation, petitioner's counsel insisted that Suello—not Proto—was the central figure in the government's case. As the court of appeals said, except for "conclusory statements" (Pet. App. 6a) petitioner has offered no explanation of why he believes that there exists material in Proto's file that the Jencks Act requires to be disclosed and that could have been significant to his defense. Thus the court of appeals, upon reviewing the evidence presented at trial, had an adequate basis for concluding that the disclosure of any Jencks Act material that might have been in Proto's file could not have altered the outcome, and the court of appeals' conclusion, based on the particular facts of the case, does not merit further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 347769 344

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